85-1326
NO.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES
AMERICA
OCTOBER TERM, 1985

PETER J. ANDING,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,

PETITION FOR A WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

HAROLD M. JENNINGS
109 W. JEFFERSON
BLOOMINGTON, ILLINOIS
61701
309/827-5425
ATTORNEY FOR PETITIONER

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SUPREME COURT, U.S.

ISSUE PRESENTED FOR REVIEW

WHETHER OR NOT DEFENDANT WAS DENIED PROCEDURAL AND SUBSTANTIVE DUE PROCESS IN THE DEFENSE OF HIS CAUSE BECAUSE OF THE UNCONSTITUTIONAL ARREST AND UNCONSTITUTIONAL IDENTIFICATION METHODS USED BY THE ILLINOIS STATE UNIVERSITY POLICE AND THE ABSENCE OF ANY EFFECTIVE LEGAL REPRESENTATION IN DEFENDANT'S BEHALF DURING ALL THE CRITICAL STAGES OF THIS CAUSE EXCEPT THE ACTUAL TRIAL.

LIST OF PARTIES

PEOPLE OF THE STATE OF ILLINOIS

Plaintiff - Appellee

PETER J. ANDING,

Defendant - Appellant

FOR APPELLANT - HAROLD M. JENNINGS
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Bloomington, IL 61701

FOR APPELLEE - Ronald C. Dozier
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TABLE OF AUTHORITIES

1. United States Code Service Court Rules, Supreme Court, Rule 17, .1.(c) May, 1983 Cumulative Supplement.

2. United States Constitution, Amendments IV, V, VI, XIV, U.S.C.A.

3. Ill. Revised Statutes 1981, Ch. 38, Sec. 107-2

4. POINTER v STATE OF TEXAS, 380 U.S. 400, 85 S.CT. 1065;

5. POWELL v STATE OF ALABAMA, 287 U.S.45,53 S. CT.55 (1932);

6. PAYTON v NEW YORK, 445 U.S. 573, 100 S.CT. 1371 (1980);

7. WONG SUN v U.S., 371 U.S. 473, 83 S. CT. 403 (1963).

8. PEOPLE v EICHELBERGER, 91 I11. 2d 359, 438 N.E. 2d 140, (1982);

9. PEOPLE v KUBAT, 94 I11. 2d 437, 471, (1983), 447 N.E. 2d 247;

10. PEOPLE v HOLIDAY, 47 I11. 2d 300, 306-307, 265 N.E. 2d 634, (1970).

11. Also see RIVERS v U.S., 400 F. 2d 935 (5th cir. 1968).

12. MIRANDA v STATE OF ARIZONA, 384 U.S. 436, 86 S. CT. 1602

13. ESCOBEDO v STATE OF ILLINOIS, 378 U.S. 478, 84 S. CT. 1758;

14. U.S. v WADE, 388 U.S. 237, 87 S. CT. 1926, (1967);

15. GILBERT v CALIFORNIA, 388 U.S. 263, 87 S. CT. 1951 (1967).

16. SMITH v COINER, 473 F.2d 877, 882, U.S. CT. of Appeals, 4th, Cir (2/73);

17. U.S. v WILSON, 283 F.Supp. 914, Dist. of Columbia Dist. Ct. (4/68).

18. SIMMONS v U.S., 390 U.S. 377, 88 S. CT. 967 (1968);

19. STOVAL v DENNO, 388 U.S. 293, 301-302, 87 S. CT. 1937 (1967);

20. WALL, EYE WITNESS IDENTIFICATION IN CRIMINAL CASES;

21. 3J. WIGMORE, EVIDENCE, sec. 786(a) 3rd ED. (1940).

22. PEOPLE v ANDERSON, 389 Mich.155 (1973) 205 N.W. 2d 461, 475;

23. THOMPSON v STATE OF NEVADA, 85 Nev. 134, 451 P.2d 704, 706, (1969), U.S. Cert. Denied, 396 U.S. 893, 90 S. CT. 189 (1969).

24. CARMICHAEL v STATE OF NEVADA, 467 P. 2d 109, Sup.Ct. of Nevada, No. 6009.

25. COMMONWEALTH v WHITING, 266 A. 2d 738, 739, 439 Pa. 205 (1970);

26. REX v HASLOM, 19 Crim. App. Rep. 59, 60, 134 L.T. Rep. 158, (1925).

27. REX v GOSS, 17 Crim, App. Rep. 196, 197, (1923),

28. PEOPLE v GOULD, 54 Cal. 2d 621, 7Cal. Rptr. 273, 278, 354 P. 2d.865,870, (1960)

29. CARNLEY v COCHRAN, 82 S. CT. 884, 889, 369, U.S. 506

30. JOHNSON v ZERBST, 304 U.S. 458, 464-465, 58 S. CT. 1019.

31. U.S. v ZEILER, 427 F. 2d 1305, 1307, (3rd Cir. June 5, 1970)

32. MASSIAH v U.S., 377 U.S. 207, 84 S. CT. 1199, 1201 (1964)

33. SPANO v NEW YORK, 360 U.S. 320, 79 S. CT. 1202 1209;

34. PEOPLE v WATERMAN, 9 N.Y. 2d 561, 565, 216 N.Y. S.2d 70, 75, 175 N.E. 2d 445, 448.

35. HAMILTON v STATE OF ALABAMA, 368 U.S. 58, 82 S. CT. 157, 159

36. U.S. v BENNET, 409 F. 2d 888, 899, (1969) (2nd Cir 1969), Cert denied,

37. HAYWOOD v U.S., 396, U.S. 852, 90s S.CT. 113, rehearsing denied, 396 U.S. 949, 90 S. CT. 376/

38. STRICKLAND v WASHINGTON, ---U.S.-- 104 S. CT. 2052, (1982).

39. MANSON v BRATHWAITE, 432, U.S. 100, 97 S. CT. 2243 (1977).

40. KIRBY v ILLINOIS, 92 S. CT. 1877, 1886, 406 U.S. 696;

41. FOSTER v CALIFORNIA, 394 U.S. 441, 89 S. CT. 1128 (1969);

42. Identification Parades, Part I, (1963) Crim. L. Rev. 479,483 ---OUT OF PROPER ORDER---

43. NIX v WILLIAMS, --U.S.--, 104 S.CT. 2501, 2511, (1984).

44. PEOPLE v WILLIAMS,93 Ill. 2d 309, 324-325, 444 N.E.2d 136 (1982).

45. PEOPLE v DE SIMONE, 9 Ill. 2d 522, 138 N.E. 2d 556, (1956).

46. CUYLER v SULLIVAN, 446 U.S. 335, 344, 100 S.CT. 1708, 1716, (1980).

47. REECE v GEORGIA, 76 S.CT. 167, 170, 100 L. ED. 77 (1955).

48. PEOPLE v GREER, 79Ill. 2d 103, 123, (1980), 402 N.E. 2d 203.

49. PEOPLE v WITHERSPOON, (1973), 55 Ill. 2d 18, 302 N.E.2d 315 (1973).

50. RUMMEL v ESTELLE, 590 F. 2d 102, 104 (C.A. 5-1979).

51. PEOPLE v EVERHART,22 Ill. App. 3rd 727, 728 318 N.E. 2d 720 (1974).

52. PEOPLE v MORGAN, 69 Ill, 2d 200, 206, 370 N.E. 2d 1063 (1977).

53. PEOPLE v KOLDEN, 25 Ill. 2d 327, 329, 185 N.E. 2d 170 (1962).

54. 73 Yale Law Journal 1000, 1030-1033, (1964).

REFERENCE TO APPELLATE COURT DECISION IN THE INSTANT CASE

GENERAL NO. 4-84-0587, June 20, 1986, in the Appellate Court of Illinois, Fourth Judicial District. A copy of this Opinion is attached as part of the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

1. The date of judgment of the Decree sought to be reviewed herein was December 4, 1985, when Defendant PETER J. ANDING's Petition For Leave to Appeal to the Illinois Supreme Court was denied. Order entered same date December 4, 1985.

2. An Order granting Defendant, PETER J. ANDING's Petition to Stay and Recall the Mandate pending application for certiorari to the United States Supreme Court was granted by Justice Ben Miller of the Supreme Court of Illinois on December 30, 1985. This stay and recall of the Mandate Order of Justice Miller is effective until an affidavit is filed with the Clerk of the Illinois Supreme Court by Defendant proving that Certiorari has been filed with the United States Supreme Court, or until the expiration of the time period within which said application for Certiorari may be filed. If no such affidavit of filing for Certiorari has been submitted to the Clerk of the Illinois Supreme Court within said aforementioned time limits, the mandate of that Court will issue without further order.

3. Jurisdiction for this Petition for Certiorari is invoked pursuant to Title 28 of the United States Code Service, sec. 1257 (3).

4. Jurisdiction for this Petition is also invoked pursuant to Rule 17.1. (c) of the United States Code Service Court Rules for the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

1. By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

2. By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

TITLE 28 OF THE UNITED STATES CODE SERVICE

PART 3 CONTINUTED ON NEXT PAGE

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3. By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED -- CONT'D

Illinois Revised Statutes 1981, Ch.38, sec. 107-2.

107-2. Arrest by peace officer

sec. 107-2. Arrest by Peace Officer. A peace officer may arrest a person when:

a. He has a warrant commanding that such a person be arrested; or

b. He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another jurisdiction; or

c. He has reasonable grounds to believe that the person is committing or has committed an offense.

United States Constitution

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but, upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV.

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari hereby appeals to the Supreme Court of the United States from the final order of the Illinois Supreme Court entered December 4, 1985, Case No. 62344 there, denying Defendant's Petition for Leave to Appeal his criminal convictions.

Defendant, Peter J. Anding, originally was arrested, indicted, and tried in the Circuit Court of McLean County, Eleventh Judicial Circuit, Case No. 83-CF-329, in Bloomington, Illinois. Following a jury trial, defendant, Peter J. Anding, on April 19, 1984, was convicted of deviate sexual assault, indecent liberties with a child, and armed violence. (Ill. Rev. Stat. 1983, ch.38, pars. 11-3,11-4, 33A-2). The court found that the indecent liberties conviction merged into the deviate sexual assault conviction and sentenced the defendant to 6 years for the deviate sexual assault and armed violence convictions.

Defendant then retained new legal counsel, Harold M. Jennings, who made a Motion for a new trial, which was denied after a Court hearing on August 14, 1984. On the same day, Defendant's new counsel timely filed his Notice of Appeal seeking reversal of the guilty verdicts and a new trial.

Defendant also filed a Motion for Stay of Judgment Pending Appeal or alternatively a motion for bond pending appeal on August 14, 1984. Defendant's bond of $5,000.00, 10% of $50,000.00 posted prior to trial, was directed by trial court Judge James Knecht, to serve as Defendant's bond for appeal. Mittimus was also stayed on August 15, 1984, during appeal and was most recently ordered continued to be stayed by Illinois Supreme Court Judge Ben Miller during these Certiorari proceedings, pursuant to Petitioner's timely Motion to Stay and Affidavit of Intent filed on December 24, 1985.

The federal questions sought to be reviewed herein were first raised in Petitioner's timely Motion for a new trial filed in the Trial Court on July 25, 1984. This motion for a new trial was prepared and filed by the Petitioner's new attorney, Harold M. Jennings, Petitioner's present counsel.

A trial Court hearing was held on August 14, 1984, before trial Court Judge James Knecht, to resolve Petitioner's allegations in his motion for a new trial. Petitioner's written motion raising the federal constitutional questions of inadequate assistance of counsel and deprivations of substantive and procedural due process were also argued orally at this Court hearing on August 14, 1984. All of Petitioner's claims of constitutional deprivations under the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution were denied by Judge Knecht at the conclusion of this hearing.

Violations of Defendant's constitutional

rights to due process and fair trial under the 4th, 5th, 6th, and 14th Amendments, also occurred at trial, because all of the identification testimony of the State's witnesses at trial was based upon and derived directly from photo identifications of Defendant. These photo identification sessions given to the State's witnesses by the investigating Illinois State University police all took place after Defendant had been arrested and was in police custody in the same building or conveniently nearby where the photo identification sessions were given by the police. No in-person lineups were given by the I.S.U. police to any State's witnesses.

The unlawful and tainted identification testimony was the primary proof of the State's case against Defendant and could and should have been excluded by Defendant's trial attorney, George Howard, by use of a Pre-Trial suppression Motion, Motion in Limine , or oral objections at trial. None of these methods of exclusion or potential exclusion were utilized by Defendant's trial attorney,

George Howard. Such misfeasance is a basic part of Petitioner's claim herein that Defendant's trial attorney, George Howard gave ineffective assistance of counsel to Petitioner as a matter of constitutional law under the sixth Amendment to the United States Constitution. Petitioner's attorney, Harold M. Jennings, raised the issue of trial attorney, George Howard's, ineffective assistance in his timely post-trial motion, at oral argument at the Court hearing on this post-trial motion, and throughout the appeal process in the Illinois Appellate and Supreme Courts.

ARGUMENT

I. WHETHER OR NOT DEFENDANT WAS DENIED PROCEDURAL AND SUBSTANTIVE DUE PROCESS IN THE DEFENSE OF HIS CAUSE BECAUSE OF THE UNCONSTITUTIONAL ARREST AND UNCONSTITUTIONAL IDENTIFICATION METHODS USED BY THE ILLINOIS STATE UNIVERSITY POLICE AND THE ABSENCE OF ANY EFFECTIVE LEGAL REPRESENTATION IN DEFENDANT"S BEHALF DURING ALL THE CRITICAL STAGES OF THIS CAUSE EXCEPT THE ACTUAL TRIAL.

In this cause, Rule 17.1. (c) of the United States Code Service Court Rules for the Supreme Court is relied upon by Defendant herein as his reason for submitting this Petition for Writ of Certiorari. The unique facts and sequence of events in this cause combined with the improper police procedures and the ineffective assistance of Defendant's trial counsel, George Howard, to substantially deny Defendant his Constitutional rights to procedural and substantive due process of law under the 14th Amendment. These significant constitutional deprivations also denied Defendant his 6th Amendment right to a fair trial with the assistance of counsel. Defendant respectfully requests judicial review of these errors of law herein described by this Petition for Writ

of Certiorari. U.S. Constitution, Amendments XIV, VI; POINTER v STATE OF TEXAS, 380 U.S. 400, 85 S.CT. 1065; POWELL v STATE OF ALABAMA, 287 U.S.45,53 S. CT 55 (1932); PAYTON v NEW YORK,445 U.S. 573, 100 S.CT. 1371 (1980); WONG SUN v U.S, 371 U.S. 473, 83 S. CT. 403 (1963).

Defendant was arrested on Monday evening October 24, 1983, by Illinois State University police, on a stakeout to capture a purported sexual molester of complaint, Brian VanHorn, a 16 year old youth. The arrest took place without a court warrant in the men's locker-room-restroom adjacent to the Metcalf Grade School swimming pool, an I.S.U. facility used by its students also for recreational purposes. The alleged sexual assault had taken place on Friday evening,near 7:00 P.M., three days earlier, October 21, 1983.

Defendant, Peter Anding, was combing his hair in this public lockerroom-restroom when he was seized and arrested by the I.S.U. police on stakeout duty. Defendant's person and locker in this bathroom were both searched

at the time of arrest, Monday evening, before he was transported to the I.S.U. campus police station for booking, fingerprinting, questioning, photographing, and further searching.

At the time of his arrest, Defendant, Peter Anding, was an 18 year old sophomore at Illinois State University, and a manager of the I.S.U. basketball team. Defendant's parents resided in Chicago, one hundred and thirty miles from the Normal, Illinois, I.S.U. campus. Defendant had no other family in Bloomington-Normal, and knew no attorney there, since he had no criminal record and had never been arrested before, nor had any legal experience.

Defendant did not know enough to contact his parents or any attorney, from the I.S.U. jail after his arrest, nor the legal experience to remain silent until an attorney had been appointed or hired for him. Instead the I.S.U.police convinced Defendant to answer their questions and sign a waiver of rights form while he was being

interrogated at the I.S.U. police station after his questionably lawful arrest.

Defendant argued during his timely Motion for a New Trial Court Hearing that this purported waiver of rights signing was not voluntary, considering Defendant's youthful age, legal inexperience, and residence in a strange town with no family support.

Prior to Defendant's alleged arrest, the I.S.U. police had no photograph of Defendant to show the complaining witness, Brian VanHorn, for identification purposes since Defendant had no previous criminal arrests, or convictions to warrant him membership in any police mugbook. Defendant was not committing any crime when arrested, but combing his hair. No policeman had seen him commit a crime, nor did any have reasonable grounds to believe that Defendant had committed a crime at the time of his warrantless arrest, as required by Illinois Arrest Statutes, Chapter 38, sec. 107-2 of the Illinois Revised Statutes of 1981. This warrantless arrest also violated Amendments

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IV, V, and XIV, of the U.S. Constitution.

The I.S.U. police only had the complainant, Brian VanHorn's physical description of his alleged attacker while they were on their stakeout duty. This description was that of a 5 foot 10 or 11 inch black male, weighing 180 pounds, according to official I.S.U. police reports entered in this cause as part of the State's Discovery Material turned over to opposing counsel. C.Vol.I, p. 51 though 69. No other witness had seen the alleged attack occur. C. Vol. I p. 51-69. All of the other potential witnesses interviewed by I.S.U. police about this alleged attack testified at trial that they had only seen Defendant in or around this Metcalf Grade School lockerroom-restroom on various dates and times different from the date of the alleged attack, October 21,1983.C. Vol. I p. 51-69. These police interviews and potential witnesses all gave varying and inconsistent descriptions of the alleged attacker also, ranging from 5 foot 10 inches to 6 foot 2 inches tall, medium to slim build, and

and every shade of color available.

One youthful interviewee, Arna Bontemps, even told the investigating I.S.U. police that the alleged attacker had a moustache. Another potential witness, not used by either side at trial, gym teacher, Mel Thake, told police that the complaint's description of his alleged attacker fit another person, named Cameron, who also worked on the I.S.U. campus at nearby Horton Field House. C. Vol. I, p. 51-69.

These seriously differing descriptions were the reasonable probable cause upon which Defendant's purported lawful seizure, arrest, and photographing were based.

The unlawful, unconstitutional arrest and booking of Defendant gave the I.S.U. police the opportunity to prove their case against Defendant by the showing of his seized photograph to the complainant, and the other potential witnesses the I.S.U. police had questioned about the alleged assault. PAYTON v NEW YORK, op. cited, 445 U.S. 573, 585; PEOPLE v EICHELBERGER, 91 Ill. 2d 359,

438 N.E. 2d 140, (1982); WONG SUN v U.S, op. cited, 83 S. CT. 403, 420. The I.S.U. police showed the complainant, VanHorn, Defendant's photograph on October 24, 1983, at the I.S.U. police station, where Defendant was also conveniently in custody after his arrest that night, According to Illinois law, use of photographic identification techniques by the police is prohibited once the suspect is in custody and a lineup of real persons is feasible. PEOPLE v KUBAT , 94 I11. 2d 437, 471, (1983), 447 N.E. 2d 247; PEOPLE v HOLIDAY, 47 I11. 2d 300, 306-307, 265 N.E. 2d 634, (1970). Also see RIVERS v U.S., 400 F. 2d 935 (5th cir. 1968).

PEOPLE v HOLIDAY, op. cited, 47I11. 2d 300, 306-307, reasoned that once a suspect is in custody, such as Defendant Anding was, no investigation purpose, remains to be served and the proceedings are now prosecutorial, when all the constitutional protections against self-incrimination are to be afforded the accused as outlined in MIRANDA v STATE OF ARIZONA, 384 U.S. 436, 86 S.CT. 1602 and

ESCOBEDO v STATE OF ILLINOIS, 378 U.S. 478, 84 S.CT. 1758; U.S. v WADE, 388 U.S. 237, 87 S.CT.1926, (1967); GILBERT v CALIFORNIA, 388 U.S. 263, 87 S.CT. 1951 (1967).

PEOPLE v KUBAT, op cited, 94 Ill. 2d 437, 471, permitted the use of photographs only because the crime scene and witnesses were spread across the Wisconsin- Illinois State borderline, with many miles separating the evidence, the witnesses, and the crime scene. Here in this cause, Defendant was in the very same small police station conveniently available for a lineup of real persons when the I.S.U. police were showing the complaining witness Defendant's photograph. There was no emergency, or extenuating, tactical problems in presenting Defendant for identification in a lineup,as there was in PEOPLE v KUBAT, op. cited, 94Ill. 2d 437, 471. See also SMITH v COINER, 473 F.2d 877, 882, U.S. CT of Appeals, 4th,Cir (2/73); and U.S. v WILSON, 283 F.Supp. 914, Dist of Columbia Dist Ct. 4/68). Defendant denied to the police that he had committed the crime.

He also presented three I.S.U. students as witnesses at trial who all testified that Defendant was in other locations at the approximate time of the crime.

The I.S.U. police also showed Defendant's photograph to many other potential witnesses after Defendant's arrest and jailing, when he was still conveniently available for a lineup of real persons. Some of these photo showings were to minor children, aged 8, 10 yearsold. Most of the photo showings were in groups of six photos or less, and were impermissibly suggestive and conducive to irreparable mistaken identity, according to Constitutional law. SIMMONS v U.S., 390 U.S. 377, 88 S.CT 967 (1968); STOVAL v DENNO, 388 U.S. 293, 301-302, 87 S.CT. 1967 (1967); Wall, Eye Witness Identification In Criminal Cases; 3J. Wigmore, Evidence, sec. 786(a) 3rd ED (1940).

The identifiaation testimony gathered from these photographic showings to the State's witnesses was allowed in its entirety at trial, and this testimony was the linchpin

to Defendant's convictions. Most of this identification evidence was also gathered after October 25 1983, the day McLean County Circuit Court appointed the Public Defender's office as Defendant's counsel. According to the I.S.U. police investigation reports, C.Vol.I, p 51-69, adult witness Maria Hirsch, was shown only one or two photos by the I.S.U. police. Her trial testimony was crucially supportive of the State's case, and very prejudicial to Defendant's interests.

PEOPLE v HOLIDAY, op. cited, 47Ill. 2d 300, 306-307, Justice Underwood writing for the Court, went on to conclude that if the photo identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, then convictions based on eyewitness identifications at trial following a pretrial identification by photograph, GILBERT v CALIFORNIA, op. cited 87 S.CT. 1951, 1957 , will be set aside.

The Illinois Appellate Court opinion on pg. 6, brushes past all this prevailing

present case law, by erroneously and improperly reviewing the in-court trial, identifications of Defendant by witnesses VanHorn, Almeida, Shanahan, and Hirsch. This, despite the fact that there is no mention in the record of this cause that the State did in fact show or prove that these in-court identifications of Defendant did have an independent basis, sufficiently attenuated from the earlier impermissibly unconstitutional photo showings to these same witnesses when a linup was called for. PEOPLE v HOLIDAY, op. cited, p. 306-307; GILBERT v CALIFORNIA, op. cited 87 S.CT. 1951, 1957.

The most important point here that Defendant believes should be redressed, by the Supreme Court, is the rudimentary fact that Defendant Anding was afforded no constitutional opportunity to challenge the photo and trial identifications because he was not represented by counsel at all, as a matter of practicality, prior to the beginning of the actual trial. By then, Defendant's fate was sealed, because the

improper identifications had not been challenged by Pre-trial suppression motions nor asked to be proved at trial that the in-court identifications were sufficiently distinguishable from the original unconstitutional taint.

Many cases have ruled that the Constitutional protections of assistance of counsel is necessary at lineups of photographs just as at lineups of real persons. PEOPLE v ANDERSON, 389 Mich.155 (1973) 205 N.W. 2d 461, 475; THOMPSON v STATE OF NEVADA, op. cited, 451 P.2d 704, 706; CARMICHAEL v STATE OF NEVADA, 467 P. 2d 109, Sup.Ct. of Nevada, No. 6009. The basis for these rulings is that the photographic showings can be just as secretive as the secret interrogations prohibited by ESCOBEDO v ILLINOIS, op. cited. 84S. CT. 1758. The risks of suggestions leading to irreparable, misidentification attend both forms of confrontation, lineups and photo showings, and there is serious difficulty in depicting what transpires therein if counsel is not present. If the accused

is left to only his own wits at these mini-trials, where identification is the only issue, there is nothing left to cross-examine at the later, actual trial, the conviction already having been locked up at the identification session. COMMONWEALTH v WHITING, 266 A. 2d 738, 739, 439 Pa. 205 (1970); U.S. v WADE, op. cited 87 S. CT. 1926, 1937. PEOPLE v ANDERSON, op. cited. 205 N.W. 2d 475, stated that identification from a still photograph is substantially less reliable than identification of an individual seen in person.

According to English law, pre-lineup displays of photographs has long been grounds for quashing the convictions. REX v HASLOM, 19 Crim. App. Rep. 59, 60, 134 L.T. Rep. 158, (1925). In REX v GOSS, 17 Crim, App. Rep. 196, 197, (1923), a police showing of photographs to witnesses after the accused had been arrested was ruled indefensible and the conviction was quashed. See also PEOPLE v GOULD, 54 Cal. 2d 621, 7Cal. Rptr. 273, 278, 354 P.2d. 865, 870, (1960).

According to THOMPSON v STATE OF NEVADA, 85 Nev. 134, 451 P. 2d 704, 706, (1969), U.S. Cert. Denied. 396 U.S. 893, 90 S.CT. 189 (1969); the photographic display is even more subject to prejudicial distortion than is a lineup. In photographic display the accused is not even present to observe the conditions of his identification. THOMPSON, op. cited. 451 P. 2d 704, 706, went on to rule that because both the photographic display and the lineup serve the same purpose, the same constitutional protections guaranteed under U.S. v WADE, are required. U.S. v WADE, op. cited 87 S.CT. 1926, 1937.

U.S. v WADE, op. cited, 87 S.CT. 1926, 1937, ruled that a defendant is entitled to the aid of counsel at all "critical stages" of the prosecution, just as at trial. POWELL v ALABAMA, op. cited. 53 S.CT. 55, 60. Wade went on to state that both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct the lineup, absent an "intelligent waiver",

as defined in CARNLEY v COCHRAN, 82 S.CT. 884, 889, 369, U.S. 506 and JOHNSON v ZERBST, 304 U.S. 458, 464-465, 58 S.CT.1019. See also U.S. v ZEILER, 427 F. 2d 1305, 1307, (3rd Cir. June 5, 1970) which stated that the considerations that led the Court in WADE to guarantee the right of counsel at lineups applies equally to photographic investigations conducted after the defendant is in custody. The dangers of suggestion inherent in a corporeal lineup identification are certainly as prevalent in a photographic identification, where the absent defendant and his counsel are even less able to reconstruct at trial what took place during the identification confrontations.

Without counsel at lineups or photo showings, such as in this cause herein, the real trial was over once the I.S.U. police got affirmative answers from the potential witnesses they showed Defendant Anding's photograph to in their unsworn, unproven procedures. U.S. v WADE, op. cited, 87 S.CT.

1926, 1936-1937; Identification Parades, Part I, (1963), Crim. L. Rev. 479, 483; POINTER v TEXAS, op. cited, 85 S.CT. 1065.

Without counsel's presence at his photo showings herein, effective representation at the only stage when legal aid and advice could help him was denied Defendant Anding. MASSIAH v U.S, 377 U.S. 207, 84 S.CT. 1199, 1202 (1964) SPANO v NEW YORK, 360 U.S. 320, 79 S.CT. 1202 1209; PEOPLE v WATERMAN, 9 N.Y. 2d 561, 565, 216 N.Y. S.2d 70, 75, 175 N.E. 2d 445, 448.

Here, many of the photographic showings to the State's witnesses were made after Defendant was appointed the public defender to represent him on October 25, 1983. No notice was even sent to the public defender's office that further presecutorial photo showings were still being conducted by the I.S.U. police with no notice to Defendant or his appointed attorney.

These showings to all the witnesses after Defendant was appointed a public defender by McLean County Circuit Court should have been excluded under the rulings of GILBERT v

CALIFORNIA, op. cited, 87 S.CT. 1951, 1957, and U.S. v WADE, op. cited 87 S.CT. 1926, 1937. THOMPSON v STATE OF NEVADA, op. cited 451, P 2d 704, 706, ruled correctly, and most sensibly that the name or stage or form of the pre-trial identification confrontation is not determinative of when the right to counsel guarantees of U.S. v WADE, attach. WADE spoke of "critical stages" of the criminal proceedings throughout the length of its opinion, not the mere fact that the lineup in WADE just happened to have occurred after defendant Wade's indictment. The basis for WADE's ruling was the same as the basis for the ESCOBEDO and MIRANDA extensions of constitutional protections, fundamental fairness and prevention of secret interrogation procedures and tactics by the police. The I.S.U. police should be held to these standards herein too by this Court of last review.

ESCOBEDO drew upon the rationale of HAMILTON v STATE OF ALABAMA, 368 U.S. 52 58,82 S.CT. 157, 159 and MASSIAH v UNITED

STATES, op. cited, 84 S.CT. 1199, 1202, both of which extended constitutional protection of the right to counsel to the point prior to where the police secretly gathered their evidence in those cases in unfair methods with no notice to defendant or his counsel, if any.

Here, the 18 year old Anding, went through an even more critical stage of prosecution than any of the defendants in HAMILTON and MASSIAH, without an attorney, with no legal experience, no maturity, and no support of family members to guide him.

According to U.S. v BENNET, WADE and STOVALL both contain definite language indicating that confrontation at a lineup even before arraignment, is a "critical stage" in a prosecution requiring that an opportunity for assistance of counsel be provided. U.S. v BENNET, 409 F. 2d 888,899, (1969) (2nd Cir 1969), Cert denied, HAYWOOD v U.S., 396, U.S. 852, 90S.CT. 113, rehearing denied, 396 U.S. 949,90 S.CT. 376.

See U.S. v WADE, op. cited. 388 U.S. 227 228, 229, 230, 236, 237.

As the trial turned out, in this one issue case, identification, the results were already predetermined from the suggestive, unfair, and secret photo identification showings the I.S.U. police conducted. The trial was not the adversarial testing process working to produce a just result, as required by STRICKLAND v WASHINGTON, ---U.S.-- 104 S.CT. 2052, (1982).

Nothing much was left to cross-examine after the I.S.U. police had picked "their best" supporting witnesses through the means of whatever photographic procedures they actually did employ. The witnesses could have been the worst rememberers of faces and events, rather than the best, as should seem most likely after a seemingly conclusive trial. But Defendant and this Court may never know, because neither Defendant nor any attorney representing his interests, his side of the story, was present when the police displayed Defendant's photo in what-

ever actual fashion they chose. SPANO v NEW YORK, op. cited, 79 S.CT. 1202, 1209. U.S. v BENNET, op. cited 409, F.2d 899.

The Illinois Appellate Court Opinion makes its own review of whether the in-court trial identification testimony of the State's witnesses had an independent basis, attenuated from the earlier improper photo identifications. The Opinion makes light of the many serious physical description contradictions and inconsistencies given by the State's witnesses at trial and to the I.S.U. police during their investigation interviews. C. Vol. I, p. 51-69. These description discrepancies are one of the factors listed by WADE and MANSON v BRATHWAITE to determine if the in-court identifications were arrived at by means independent of the original tainted photo identification. MANSON v BRATHWAITE, 432,U.S. 100, 97 S.CT. 2243 (1977).

Another factor listed by WADE and MANSON is whether another person was identified in a lineup or photo show-up. Here the I.S.U.

police reports show that teacher Mel Thake told them that complainant's description of his alleged attacker fits a person named Cameron, who also worked on the I.S.U. campus, at nearby Horton Field House. C. Vol. I, p. 51-69. Jeff Skeels, an assistant coach for the Redbird Swim Club which complainant and the minor State's witnesses belonged to, told the interviewing I.S.U. police that he could not be sure if the male whom he had seen in the boy's lockerroom at Metcalf Grade School accasionally, was pictured within the same series of six photographs that complainant picked the Defendant out of. C. Vol. I,p. 51-69.

Under the MANSON test of reliability, considering the totality of the circumstances herein involved, Defendant argues that the State's few supporting witnesses, who never did actually witness any crime, had no independent basis for their in-court indentification testimony. MANSON v BRATHWAITE, op. cited, 97 S.CT. 2243. Under the per se exclusionary rule of GILBERT v CALIFORNIA,

op. cited, 87 S.CT. 1951, 1957, any trial testimony about any pre-trial identification should be stricken from this record. Any in-court identification testimony must also now be scrutinized upon remand to the trial court for an evidentiary hearing, where the prosecution must show by clear and convincing evidence that this in-court identification testimony had a basis independent of the illegal photo identifications. GILBERT v CALIFORNIA, op. cited; KIRBY v ILLINOIS, 92 S.CT. 1877, 1886, 406 U.S. 696; FOSTER v CALIFORNIA, 394 U.S. 441, 89 S.CT. 1128 (1969); THOMPSON v NEVADA, op. cited, 451 P. 2d 704 706; PEOPLE v ANDERSON, op. cited, 205 N.W. 2d 461, 475; COMMONWEALTH v WHITING, op. cited, 266 A. 2d 738, 739; U.S. v ZEILER, 427 F. 2d 1305, 1307; AMENDMENTS VI, XIV, U.S. Constitution.

Without the identification testimony of the State's witnesses, there is no other evidence in the record sufficient to convict Defendant of any crime beyond a reasonable doubt. The State did not offer at trial to

prove that the identification testimony of its witnesses was arrived at by means independent of the impermissibly suggestive photo identifications. Neither did the State offer any proof that it would have ultimately or inevitably discovered that Defendant would have been found or recognized by the complainant or any other person, as required by NIX v WILLIAMS, --U.S.-- 104 S.CT. 2501, 2511, (1984).

Without the original illegal photographic identifications gathered by the I.S.U. police, there would have been no basis to uphold Defendant's arrest and he would not have been in any courtroom to be identified by any witness. PAYTON v NEW YORK, op. cited, 100 S. CT. 1371; WONG SUN v U.S., op. cited, 83 S. CT. 403.

Another crucial factor involved in the deprivation of Defendant's constitutional rights heretofore described was the complete absence of any meaningfull legal representation in Defendant's behalf during all the early critical stages of Defendant's arrest,

identification, prosecution, and pre-trial period. Though Defendant had been appointed public defender, Scott Drazewski by the McLean County Circuit Court on October 25, 1983, the day after his arrest, the only legal action done by Drazewski was in his own behalf. Drazewski motioned the Court to withdraw from the case as soon as Defendant's parents posted the $5,000.00 cash bail for their son, 10% of $50,000.00. His reasons given on his November 7, 1983, motion were that such bail posting showed that Defendant could afford to hire private counsel.

Defendant's parents during the critical early stages of this cause were attempting to hire an attorney for their son, and settled on George Howard, of Chicago, on the basis of a neighbor's recommendation. Since they had been law-abiding, respectable citizens all their life, they had no criminal law experience, nor knew any criminal lawyers.

The retention of Mr. Howard, of Chicago, was probably a tactical error which they did

not realize at the time, since their son, the crime scene, the evidence, and all the witnesses were located 130 miles away in Normal, Illinois, making investigations and evidence gathering more time consuming and expensive.

As the sequence of events and circumstances transpired in this cause, Mr. Howard wound up making no trips to Bloomington-Normal in this cause, except for the actual two day jury trial on April 18, and 19, 1984. Whenever there were McLean County Court dates in this cause, Mr. Howard had Scott Drazewski, substitute his appearance as counsel for Mr. Howard. Mr. Drazewski was allowed by the Court to drop from the case on November 18, 1983, the same date that three felony Indictments were returned against Defendant. C. Vol. I, p. 2, 3. Attorney Howard didn't file his formal Entry of Appearance until December 13, 1983.

Attorney Howard made no pre-trial motions on Defendant's behalf either, though such motions were clearly called for because of

the unconstitutional arrest and identification tactics of the I.S.U. police. PEOPLE v WILLIAMS, 93 Ill. 2d 309, 324-325,444 N.E. 2d 136 (1982), cited by Defendant in its Appeal Brief, listed the failure to file a pre-trial motion to suppress questionable damaging evidence as the first grounds for reversing a conviction there becuase of ineffective assistance of counsel. No motion in limine to exclude the damaging identification testimony flowing unattenuatedly from the unconstitutional arrest and photographing of Defendant was made either.

Attorney Howard entered into no plea bargain negotiations with the McLean County State's Attorney's office either, continually assuring Defendant's parents that the evidence was insufficient to convict their son, and that he would be exonerated.

Defendant and his parents had virtually no pre-trial access to attorney Howard, except on the eve of trial, even though there were substantial fact investigations and witness interviews that needed to be done to prepare

an adequate defense to Defendant's serious felony indictments. Attorney Howard also missed a very important Illinois State University Judicial Board Inquiry into the alleged criminal charges against Defendant. This official University hearing was in fact an almost mock trial of the crimes charged against Defendant for I.S.U. disciplinary purposes. All the witnesses and complaints, facts, and police evidance were presented which Defendant's attorney could have viewed or participated in. This I.S.U. hearing was held on November 2, 1983, shortly after the criminal events transpired, when all the facts and evidence for and against Defendant were fresh and located in one place. Attorney Howard assured Defendant's parents that he would attend this university disciplinary hearing, but didn't. He tried to excuse his absence by claiming car problems, even though Defendant's parents had invited Howard to ride with them in their car. R.Vol. IV, p. 420, 421.

This missed opportunity for witness

interviewing and evidence examination gains added weight when the distance factor separating attorney, client, and crime scene is considered. The 130 miles separating Chicago and Normal made contact of the transient student witnesses difficult and more expensive. Hence, this one-time convening of all the parties for and against Defendant was a significant event in this cause, almost a dress rehearsal for trial.

Defendant argued in its Appeal Brief, p. 19, that a person's constitutional rights to a fair trial with assistance of counsel is not satisfied by the mere formality of appointment or retention of counsel. Effective, real, representation and advocacy throughout all stages of trial are required by the Sixth Amendment. U.S. Constitution, Amendment VI; PEOPLE v DESIMONE, 9I11. 2d 522, 138 N.E. 2d 566, (1956); POWELLv ALABAMA, 287 U.S. 45, 53 S.CT.55 (1932); MASSIAH v UNITED STATES, op. cited, 84 S.CT. 1199, 1202; U.S. v WADE, op. cited, 87 S.CT. 1926, 1931.

In this cause, attorney Howard charged Defendant's parents a substantial fee to represent their son, but did no more than file an Entry of Appearance form, a standard discovery motion, and showed up for trial. This "appearance" of representation by attorney Howard didnot meet the minimum standard of the Sixth Amendment and the case law interpreting same. SPANO v NEW YORK, 360U.S. 315, 79 S.CT. 1202; POWELL v ALABAMA, op. cited, 53 S.CT. 55, 64.

Because Defendant's only defenses were alibi and mistaken identification, and because the arresting and investigating Illinois State University police violated constitutional substantive and procedural law, more was required in this cause to satisfy the Sixth Amendment's minimum standards of assistance of counsel than attorney Howard performed for Defendant herein. CUYLER v SULLIVAN,446 U.S. 335, 344, 100 S.CT. 1708,1716, (1980); REECE v GEORGIA, 76 S.CT. 167, 170, 100 L. Ed 77 (1955); POWELL v ALABAMA, op. cited, 53 S.CT. 55, 65.

U.S. v WADE, op. cited, 87 S.CT. 1932.

According to STRICKLAND v WASHINGTON, ---u.s.--- 104 S.CT. 2052, (1984), the adversorial testing process must work to produce a just result. Here the results of Defendant's trial were predetermined prior to trial because of the unique facts and circumstances described herein and the ineffective assistance of Defendant's trial attorney, George Howard. The U.S. Supreme Court recognized in U.S. v WADE, 388 U.S. 237, 18 L. Ed 1164, (1967), that the period from formal charges to trial is perhaps the most critical period to the proceedings during which the accused requires the guiding hand of counsel if the guarantees of the Sixth Amendment are to be anything more than empty promises.

Most revealing about attorney Howard's misfeasance or plain laziness is his failure to interview witnesses favorable to Defendant. Witnesses Mel Thake, Jeff Skeels, Arna Bontemps, and Tony Matheny all made potentially exculpatory statements to the I.S.U. police

during their investgatory and prosecutorial interviews. None of these witnesses were interviewed or utilized in any way by attorney Howard prior to trial or at trial.

Attorney Howard knew or should have known about the potentially exonerating statements given by these four witnesses because their statements in the I.S.U. police investigative reports were routinely turned over to him by the State's Attorney's office as part of their Discovery Material. C. Vol. I p. 2, 3.

Defendant cited PEOPLE v GREER, 79 Ill. 2d 103, 123, (1980), 402 N.E. 2d 203, in his Appeal Brief, pg. 18, as supporting his claim that trial attorney Howard's failure to interview and utilize Mel Thake and Arna Bomtemps indicated actual incompetence and ineffective assistance of counsel. PEOPLE v WITHERSPOON, (1973), 55 Ill. 2d 18, 302 N.E. 2d 315 (1973). Defendant made the same claim for Attorney Howard's failure to utilize witnesses Jeff Skeels and Tony Matheny also in his Petition for Leave to Appeal to

the Illinois Supreme Court.

Defendant also cited STRICKLAND v WASHINGTON, -- U.S.--- 104 S.CT. 2052, 2061, (1984), in its Petition for Rehearing, P. 2, for its ruling that there can be no attorney tactics defined as mere strategy, normally excusable, which renders a witness investigation unnecessary when there is only one plausible line of defense. Here, Defendant's only basic defense was that of mistaken identification by the complaining witness.

A reasonably substantial investigation into the potentally exonerating testimony of the un used witnesses, Mel Thake, Jeff Skeels, and Tony Matheny, was also required under the ruling of RUMMEL v ESTELLE, 590 F. 2d 102, 104 (C.A.511979). No such investigation of these three potential witnesses was made by trial attorney Howard ,which might have substantially bolstered Defendant's claims of innocence and alibi to the point where the jury felt that there was reasonable doubt that Defendant was in fact guilty of the crimes charged.

Defendant also argued at trial and on appeal that the State's evidence presented at trial did not meet the higher standard of proof required in Illinois in indecent liberties cases. PEOPLE v EVERHART,22 Ill. App. 3rd 727, 728, 318 N.E. 2d 720 (1974); PEOPLE v MORGAN,69 Ill. 2d 200, 206, 370 N.E. 2d 1063 (1977). According to these cases, "Clear and convincing" testimony from the complaining victim, or corroboration, must be proved beyond a reasonable doubt, when the Defendant denies the charges, as he did here.

The only corroborating testimony supporting complaint VanHorn's testimony in this cause, merely placed Defendant in the same bathroom-lockerroom, all on dates and times different from the date of the alleged crime. In PEOPLE v MORGAN, op. cited, 69 Ill. 2d 200, 207 2nd paragraph, the Illinois Supreme Court ruled that merely placing the accused in the same house with the complainant is insuff-icient corroboration to sustain indecent liberties convictions. See also PEOPLE v

KOLDEN, 25 Ill. 2d 327, 329, 185 N.E. 2d 170 (1962).

Defendant concludes that the substantial constitutional deprivations suffered by Defendant at the hands of the overreaching I.S.U. police, his ineffective counsel, and the facts and circumstances arising from his own youth and immaturity, all combined to create a trial that was not only unjust, under the standards of STRICKLAND v WASHINGTON, op. cited, 104 S.CT. 2052, 2067, but also pre-determined before it began, violating U.S. v WADE, op. cited, 87 S.CT. 1926, 1931, POWELL v ALABAMA, op cited, 53 S.CT. 55, 60-62; Note, 73 Yale Law Journal 1000, 1030-1033 (1964) also; and PEOPLE v KOLDEN, op. cited 25 Ill. 2d 327, 329; ESCOBEDO v ILLINOIS, op. cited, 1758.

CONCLUSION

For the aforementioned reasons, Defendant prays this Supreme Court to grant his Petition for Writ of Certiorari, or remand this cause for a new, just trial.

In the alternative, Defendant prays this Supreme Court remand this cause to the trial court, as was done in PEOPLE v HOLIDAY, 47 I11, 2d 300 (1970) for a hearing to determine if the photographic identification procedures employed by the I.S.U. police was so impermissibly suggestive as to give rise to a very substantial liklihood of irreparable misidentification.

Repectfully submitted,

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